Editor's note: 84 I.D. 282; Appealed -- aff'd, sub nom., State of South Dakota v. Andrus, Civ. No. 77-5058 (D.S.D. Dec. 26, 1978) 462 F.Supp. 905 aff'd, No. 79-1178 (8th Cir. Feb. 12, 1980), 614 F.2d 1190 cert denied, 449 US 822, 101 S.Ct. 80 (Oct. 6, 1980)

UNITED STATES

v.

PITTSBURGH PACIFIC COMPANY

IBLA 74-271 Decided June 15, 1977

Appeal from so much of decision of Administrative Law Judge as dismissed contest brought by Montana State Office, Bureau of Land Management, against 12 lode claims located within the Black Hills National Forest under mineral patent application MONTANA 032330 (S.D.).

Set aside and remanded.

1. Mining Claims: Contests -- Mining Claims: Determination of Validity -- Mining Claims: Discovery: Generally -- Mining Claims: Patent -- Rules of Practice: Appeals: Burden of Proof

   A mining claimant must prove a discovery under the prudent man test, including that the mineral can be extracted, removed and marketed at a profit.

2. Administrative Procedure: Substantial Evidence -- Evidence: Sufficiency -- Mining Claims: Contests -- Mining Claims: Determination of Validity -- Mining Claims: Discovery: Generally -- Mining Claims: Environment

   In a contest of a patent application for a lode mining claim, the Board of Land Appeals may remand the case for further hearing to complete the record regarding the (1) availability and expense of necessary financing, land and water, (2) the expense of labor, and (3) the expense of compliance with environmental protection laws.

3. Environmental Policy Act -- Mining Claims: Environment -- National Environmental Policy Act of 1969: Environmental Statements

   When parties are to offer evidence as to costs, to a mining claimant, of measures required by statute or regulation to mitigate environmental impact from development of a mine, it would be helpful for a Government contestant to assist an intervening state government and the claimant in computation of such costs; however, under 42 U.S.C. § 4332 (1970), an environmental impact statement is not required prior to the nondiscretionary federal action of issuance of a mineral patent.

APPEARANCES: John C. Banks and Jack E. Hanthorn, Esqs., U.S. Department of Agriculture, Denver, Colorado, for appellant, United States; Horace R. Jackson, Esq., Lynn, Jackson, Shultz, Ireland and Lebrun, Rapid City, South Dakota, for appellee, Pittsburgh Pacific Company; Attorney General William J. Janklow and Assistant Attorney General Lawrence W. Kyte, Pierre, South Dakota, for amicus curiae State of South Dakota; Richard W. Bliss, Esq., for amicus curiae American Mining Congress.

OPINION BY ADMINISTRATIVE JUDGE GOSS

The United States appeals from so much of a decision of Administrative Law Judge John R. Rampton, Jr., as dismissed a contest proceeding against a mineral patent application filed by appellee Pittsburgh Pacific Company for twelve 20-acre lode mining claims 1/ located within the Black Hills National Forest, Lawrence County, South Dakota. The claims are contiguous and stretch in a north-south direction for somewhat over a mile. Upon request of the Forest Service, U.S. Department of Agriculture, the Bureau of Land Management filed a contest complaint against appellee's patent application, contending there had been no discovery of valuable mineral deposits and asking that the claims be held invalid. By order, the Board granted petitions of State of South Dakota 2/ and American Mining Congress to file briefs as amici curiae.

The United States contends generally that Pittsburgh has not proved the discovery of valuable deposits, and supports its argument with allegations of error in the geological and economic analysis performed. Additionally, the State of South Dakota

1/ The claims involved on appeal are Pitt Pac Nos. 1 through 9 and Spec. Nos. 1 through 3. Two other lode claims, Spec. Fraction and Magnetite Fraction, were declared void by the Administrative Law Judge, and no appeal was taken as to those claims.
2/ Pittsburgh and South Dakota reply briefs were filed September 2, 1975.

argues, inter alia, that adequate consideration has not been given to cost of compliance with environmental quality statutes and regulations.

Pittsburgh claims discovery of some 160 million tons of relatively low grade iron ore, including specular hematite and martite. Pittsburgh intends to mine 96 million tons under a plan of operation which includes the annual removal of 7,200,000 long tons of ore; the crushing of the best 4,900,000 long tons; the cobbing (preliminary separation) of that ore; the reduction roasting of the best 2,300,000 long tons until all of the iron is magnetized and more readily ground and separated; grinding and magnetic separation, with gangue rock washed away; and the compression, into hard pellets, of 1,000,000 long tons of ore. The process of reduction roasting followed by fine grinding and magnetic separation of iron has not been used except on an experimental basis in a laboratory or pilot project. Each year 10,000 rail cars of such pellets, containing 62.68 percent natural iron, would be loaded and shipped. Pittsburgh states that unless patents are issued, the necessary financing cannot be obtained. 3/ Assuming a 20-year payout on investment, and pellet

3/ The Board recognizes that many very sizeable mining ventures have been fully operated without patent.

prices as of February 1975, 4/ the proposed operation would involve well over 1/2 billion dollars in gross revenue.

For reasons set forth hereafter, the decision of the Administrative Law Judge must be set aside and the case remanded. The decision, however, is well reasoned, and except as modified herein, the findings and conclusions are accepted.

[1] Pittsburgh is entitled to a patent for a particular claim if a "valuable mineral deposit" has been discovered on that claim. 30 U.S.C. §§ 22, 29 (1970). The test for determining whether or not deposits are "valuable" was set forth in Castle v. Womble, 19 L.D. 455, 457 (1894):

> [W]here minerals have been found and the evidence is of such a character that a person of ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success, in developing a valuable mine, the requirements of the statute have been met.

This test has been cited with approval by the Supreme Court. E.g., Best v. Humboldt Placer Mining Company, 371 U.S. 334, 335-36 (1963). To satisfy this prudent man test, Pittsburgh must show marketability

4/ Pittsburgh alleges on appeal that the price of taconite pellets, at 62.68 percent natural iron, has increased at the lower lake ports from $15.795 per gross ton in October 1969 (when Pittsburgh prepared its cost/profit analysis) to $28.331 in February 1975, an increase of 79.4 percent. While the Board notes the rate of inflation, including the high increase in cost of energy, such new evidence is discussed infra.

under United States v. Coleman, 390 U.S. 599, 600 (1968), i.e., that "the mineral can be extracted, removed, and marketed at a profit." United States v. Kottinger, 14 IBLA 10 (1973).

The Government concedes that Pittsburgh is acting in good faith in claiming the lands for the purpose of mining ore in paying quantities. The test, however, is objective rather than subjective. The United States grants title to mining claims in the national interest after finding there is a reasonable prospect that a successful mine will be developed.

[2] While Pittsburgh has submitted considerable evidence which indicates that a discovery has been obtained, there remain factors - some of which may be beyond the control of Pittsburgh - which could stand in the way of a profitable mining operation. After evaluating the evidence, we conclude that substantial questions exist with respect to adequacy and cost of water supply, additional land, financing, labor costs, and expense of compliance with environmental protection laws.

Water Supply

No significant dispute exists over the amount of water needed for the mining and beneficiating process. It is agreed some 20,000 to 25,000 gallons per minute (gpm) of water will be used, with a

recycle rate of approximately 95 percent, thus requiring 1,000 to 1,250 gpm of new water during operation. As possible sources, Pittsburgh has cited Box Elder Creek and nearby flooded abandoned mines, natural springs, and wells. It will be necessary for Pittsburgh to construct ponds of substantial acreage and depth for water storage, to supply water during relatively dry spells.

The United States argues that Pittsburgh has failed to prove that sufficient water would be available at the claims in South Dakota. Noting problems of obtaining ownership of water from private sources and permits for water from public sources, the Government characterizes Pittsburgh as "seem[ing] to have assumed that, with so much water around, it could secure enough for its use." Further, the Government argues that, even assuming arguendo the water is available, Pittsburgh has not adequately accounted for water-related costs involving acquisition of the water, additional land for storage and tailings reservoirs, construction of such reservoirs, possible pipeline easements, and pumping costs. See United States v. Osborne (Supp. on Judicial Remand), 28 IBLA 13 (1976); United States v. Kosanke Sand Corporation (On Reconsideration), 12 IBLA 282, 308-09, 80 I.D. 538, 551 (1973). In Osborne at 35, the Board indicated that a prudent man would be assured that an element essential to his mining operation was available, before he would make further expenditures:

> Since water is essential, and its lack makes aggregate production "very costly," it would seem that prudence would demand that the claimants satisfy themselves as to its availability in sufficient quantity before they "[w]ould be justified in the further expenditure of their labor and means, with a reasonable prospect of developing a paying mine." Castle v. Womble, 19 L.D. 455, 457 (1894); Chrisman v. Miller, 197 U.S. 313, 322 (1905); Cameron v. United States, 252 U.S. 450, 460 (1920); Best v. Humboldt Placer Mining Co., 371 U.S. 334, 336 (1963); United States v. Coleman, 390 U.S. 599 (1968). Yet these claimants apparently are content to simply presume the availability of water on the claim in the desert to the approximate volume of 400 gallons per minute. No evidence was adduced to show how water would be obtained if none were found on the claim, or what effect this might have had on their ability to market aggregate at a profit prior to July 23, 1955.

Referring to cost figures presented at the hearing, Pittsburgh states that the "per ton production costing on plant construction would include (and does in most reported figures) cost of land and water." On the question of availability of water, Pittsburgh has submitted on appeal reports from professional ground water geologists who conclude that the company's stated need for 1,000 gpm, or 1,300 acre-feet of water per year, can be met entirely from the flow in Box Elder Creek, assuming that a 3-year water storage facility for approximately 4,000 acre-feet is constructed to insure that water will be available. The reports do not deal explicitly with the question of how much of this flow would be available to Pittsburgh for appropriation, 5/ nor are there estimates of costs of transportation

5/ In its response brief to the amicus brief of the State of South Dakota, the United States suggests that a permit must be obtained from the South Dakota Water Resources Commission.

of water from the stream to the plant. Such evidence may not be considered by the Board except to determine whether the hearing should be reopened. United States v. McKenzie, 20 IBLA 38, 44 (1975).

The evidence adduced at the hearing does not fully establish that sufficient water is reasonably available. Pittsburgh stated its volume of water requirement, noted several possible sources for that much water, and argued that there would thus be sufficient water. There was, however, no detailed showing that the rights could be acquired, nor was there any specification of cost of such supply, beyond the general statement of construction costs. On remand, the parties will have the opportunity to show more clearly whether the requisite water supply can be obtained and delivered at a feasible cost.

Additional Land

Pittsburgh will require approximately 600 to 900 acres of land outside the mining claims upon which to construct its plants, tailings pond, and water storage reservoir (Tr. 899). A small portion of this land may be available to appellants as millsites. 43 CFR Subpart 3864. The Government alleges that Pittsburgh has not shown it will be able to obtain the necessary land. Pittsburgh contends that there "is substantial land in private ownership adjacent to and in the near vicinity of the involved claims * * * [which] can

be acquired in the normal course of business when the time comes." Additionally, Pittsburgh notes that it is possible to purchase lands in other areas and exchange them with the Forest Service for adjacent land within Black Hills National Forest.

Pittsburgh presented oral evidence that sufficient lands in private ownership exist near the claims. The Board takes official notice of the more current status plats 6/ for the areas surrounding the mining claims. 43 CFR 4.24b. After studying these plats, a question remains as to whether Pittsburgh will be able to obtain the required acreage of appropriate location without obtaining national forest lands. While there may be private tracts which are geographically and economically feasible, this is not clear from the record.

Apparently, the only other feasible land is in the National Forest, managed by the Forest Service. Since this contest was initiated at the request of the Forest Service, it is not clear whether the Service would be amenable to the necessary exchange.

A reasonably prudent man would take steps to assure that essential land is available to the project. See Osborne, supra. On

6/ The plats are: (1) MT Plat, T. 3 N., R. 5 E.; (2) MTP Suppl. Sec. 18, 21, 22, T. 3 N., R. 5 E.; (3) MT Plat, T. 3 N., R. 4 E., Black Hills Meridian, Lawrence County, South Dakota. The maps were current as of June 16, 1976, and were supplied by the Montana State Office, Bureau of Land Management.

remand, Pittsburgh will have an opportunity to show that it can acquire the requisite suitable acreage for the anticipated construction, in a feasible configuration and at a price harmonious with a profitable mining operation.

Financing

Pittsburgh estimated that as of October 1969, some $28,000,000 would be required to finance the project. The Government argues that Pittsburgh had shown no source of financing. Pittsburgh states that "normally financing is done or at least underwritten by the users of the product, the steel mills and companies desiring to insure a source of supply." 7/ At the hearing, John D. Boentje, Pittsburgh's President, testified that:

> [O]f the pellet projects that have been initiated in this country there is probably only one that does not have a steel company as a sole owner or a partnership of an iron ore company and a steel company or a partnership of several steel companies possibly with an iron ore company. [8/]

He also averred that he would not, on the basis of the projections made for this operation, hesitate to approach the steel companies to invite their financial participation. 9/

7/ Brief for contestee, January 17, 1973 at 92-93.
8/ Tr. 439.
9/ Tr. 440.

Fred DeVaney, an expert witness brought in by the Company, noted that "[m]uch of the money that has gone into these taconite plants has come from insurance companies, and much has come from the steel companies that need the pellets." 10/ DeVaney also gave a step-by-step account of the process typically undertaken by an iron ore mining company in securing financing for a project from the various steel companies, 11/ but he explained further that:

> One of the first things they ask you is do you have title to your land or do you have options on it. And I mean, if you don't have an option or title to it, they are not very much interested in putting any money in it until they know where you are at. [Emphasis added.] So that is why you carry things so far until we get financing on it. [12/]

The Department, of course, is most anxious that it not patent the land only to have the project fail for lack of financing. The upwards of $28,000,000 in financing is as essential to appellant's project as is the required water and land. If it could be shown by further evidence that a responsible financial source would probably furnish the funds needed, conditioned upon patents being issued by the United States, this would help to assuage Departmental questions as to the likelihood of full development of the deposit. The Board does not believe a prudent miner would continue making his own substantial investments until he has a reasonable expectation of

10/ Tr. 709-10.
11/ Tr. 709-13.
12/ Tr. 711.

success in developing a valuable mine and of the availability of additional funds, if necessary, at feasible interest cost. See Osborne, supra. 13/ On remand, the parties will have the opportunity to present evidence as to potential availability of financing and other matters as discussed herein.

Labor Costs

To determine the estimated cost of labor, the parties have introduced the cost experience of Pittsburgh and comparable companies.

Pittsburgh's case re labor costs was made out by Pavel Zima, an engineer with the company, primarily by means of the economics section of the Mineral Evaluation Report, Exhibit M-4. 14/ This report shows operation-by-operation estimates of labor needs and costs, and labor expense is allocated to each processing step. Zima's labor estimates at each step are merely stated, however, and are not explained, describing the operation involved and detailing why the given number of men at a given wage cost is needed.

Government witness Dr. Alfred Petrick stated as his opinion that 252 persons, rather than 177, as estimated by Zima, would be

13/ The Board does not mean to indicate that for mining claims involving operations of substantially lesser scope, similar evidence of financing would ordinarily be necessary.
14/ See also the hearing transcript at 771-72, 777-79, 808.

necessary for the total operation, and that the increase in costs occasioned by the 75 extra persons would then be approximately $948,000 annually. 15/ A major factor in Petrick's analysis of Pittsburgh's total labor needs was a comparison of labor use experience in several other plants. At page 997 of the hearing transcript, he stated:

> Of course, we are dealing with different outputs and have to make some allowances, but looking at seven or eight or nine plants' totals, and looking at the maintenance force as a percentage of the total, I don't feel that I would be out of line adding this number of men to the maintenance crew at this operation and the total is in the same area so far as total employment of these other plants.

Petrick did not specify the individual operations to which he believed the members of the increased labor force would be allocated. Neither did he give a detailed breakdown of the comparison process he employed in analyzing the relevance of the labor experience of the seven to nine other plants. Though Pittsburgh did cross-examine Petrick on his labor estimates, it made no attempt to offer additional evidence on this question.

The following evidence provides an additional basis for comparison with Pittsburgh's anticipated labor costs: a 1962 news summary (Exhibit M-48) noting that the Kirkland Lake plant in Canada

15/ See the hearing transcript at 934, 946-49, 995-1000.

would produce 1 million tons per year (tpy) of 66 percent iron pellets from ore of an undisclosed concentration by employing 400 persons; a 1963 brochure (Exhibit M-37) describing the Groveland Mine in Michigan, where 180 employees produced 1.25 million tpy of similar pellets out of ore averaging 33 percent iron, and where ore of concentration less than 25 percent was not processed; a 1964 memo (Exhibit M-39) from Pittsburgh's President re Eveleth Taconite Company's plans for a mine employing 350 to 375 persons to produce 1.63 million tpy of similar pellets from ore of undisclosed concentration; a 1969 brochure (Exhibit M-36) and a 1970 article 16/ on the Jackson County Iron Company in Wisconsin, stating that 750,000 tpy of similar pellets were produced from ore of a 22 to 23 percent iron content through the efforts of 230 workers and managers; an article (Exhibit M-44) projecting that a plant could use a reduction roasting process to produce at a profit 1.2 million tpy of 64 percent pellets from 40 percent ore at a labor cost of $900,000 per year; and a 2-page study attached to Exhibit M-44 forecasting labor costs of $1,127,848 per year for a reduction roasting plant producing 2 million tpy of 64 percent pellets from 45 percent ore. Only the latter two projected operations involve reduction roasting.

Questions remain regarding Pittsburgh's estimate that it will be able to produce 1 million tpy of 63 percent pellets out of ore

16/ Attached to Pittsburgh's response to the amicus brief of the American Mining Congress.

averaging 17 percent iron content, with a processing cut-off at 12 percent concentration, while employing only 177 persons. At the Groveland Mine, noted above, 25 percent greater production than Pittsburgh contemplates is achieved with approximately the same number of employees, but the ore bears slightly more than twice as much iron, and no reduction roasting process is necessary. Because of the lower iron concentration in its ore, Pittsburgh may have greater labor expenses involved in drilling, blasting, mining, and transporting the larger volumes of ore, putting it through at least the primary stages of beneficiation, and disposing of waste material. In the Jackson County Iron Company example, we see 25 percent less output than Pittsburgh intends, but at a 30 percent higher employment level. Assuming arguendo that the ore concentration is as low for the Kirkland Lake and Eveleth Taconite projects as it would be for Pittsburgh's, we note that Kirkland Lake uses 400 persons to produce the same tonnage per year as Pittsburgh forecasts, and that Eveleth was expecting an output only 63 percent higher than Pittsburgh's but at a utilization of 100 percent more employees.

While the evidence discussed above would on its face indicate that Pittsburgh's labor expense estimates are too low, we do not feel that there is sufficient evidence in the record for us to determine the matter. Petrick only barely detailed in his testimony the evidence upon which he based his opinion that the labor cost projection

must be raised. We recognize that there can be differences in mining and engineering factors between various mines and plants producing the same iron pellets, and that these differences can have a substantial influence on labor costs, e.g., the relative softness of the South Dakota ore compared with the ore of the Mesabi Range mines, or the possibility of higher percentage recovery of iron because of reduction roasting. Additional evidence is necessary to assess the accuracy of Pittsburgh's labor expense projections.

Cost of Compliance with Environmental Quality Statutes and Regulations

At the hearing, environmental costs were considered only to a limited degree. In Pittsburgh's testimony and in the economics section of Pittsburgh's Exhibit M-4, it was succinctly given that environmental protection costs were comprehended by the anticipated general construction costs listed in the report, plus 1 cent for miscellaneous environmental control for each ton shipped. Construction was to be undertaken as a matter of course in a manner which would assure environmental quality maintenance.

Neither did the government establish the environmental protection measures which would be required and the cost thereof. However, it is noted that considerable environmental legislation and regulations have been promulgated since the evidence herein was first formulated.

As amicus curiae, South Dakota has posed questions concerning water quality, air pollution, reclamation and other problems. The cost of compliance with governmental and other environmental requirements are of course significant in determining whether there has been a discovery. Kosanke, supra at 12 IBLA 298-99, 80 I.D. 546-47.

As stated, there would be a removal of some 7.2 million tons of material per year, ultimately affecting an area of about 240 acres now within a national forest. In addition, Pittsburgh would need to construct ponds and buildings over some 600 to 900 acres on other lands in the area. Some 4.9 million tons will annually move into the beneficiation process, and this may create the need for environmental controls as to dust and disposal of waste water and soil. All told, some 6.2 million tons of waste earth will have to be disposed of. Though Pittsburgh had proposed to use natural gas, the roasting of 2.3 million tons per year could create air pollution problems. A railroad spur will have to be constructed, presumably through the National Forest. Adjacent to the claims are two creeks which South Dakota states it has classified as cold water fisheries.

The State is therefore admitted as a party to the contest, in order that the State, together with the other parties, may offer new evidence 17/ as to environmental requirements, the cost of compliance, and other pertinent factors.

17/ See infra.

Environmental Impact Statement

[3] The State of South Dakota submits that an Environmental Impact Statement (EIS), 42 U.S.C. § 4332 (Supp. V, 1975), would serve a useful purpose in the Department's deliberations. The principal State arguments may be summarized:

> 1. The action of issuance of patents is a major federal action significantly affecting the human environment under § 4332 in part because Pittsburgh admits the essential financing of the project cannot be obtained unless the patents are issued.
>
> 2. Preparation of a federal impact statement is not "impossible" under § 4332, regardless of whether a patent is required to issue. Rather, the Act requires compliance to the fullest extent possible.
>
> 3. One of [the EIS] purposes is to require the giving of attention to an environmental problem regardless of whether the agency has authority to do anything about it. The Scenic Rivers Association of Oklahoma v. Lynn, 520 F.2d 240, 245 (10th Cir. 1975), rev'd on other grounds, sub nom., Flint Ridge Development Company v. Scenic Rivers Association of Oklahoma, 426 U.S. 776 (1976).
>
> 4. The EIS would be helpful in providing information to the Secretary of the Interior for utilization in submitting his report for Congress under 30 U.S.C. § 21a (1970), to other executive offices, to the Congress itself, to the State and to others generally. [See Natural Resources Defense Council v. Morton, 458 F.2d 827, 833 (D.C. Cir. 1972).]
>
> 5. The National Environmental Policy Act (NEPA) requires the Federal Government to make available its expertise to assist the States in discharging their responsibility to determine potential adverse impacts and to take necessary steps to mitigate. 42 U.S.C. § 4332(2)(G) (Supp. V, 1975).

> 6. The Administrative Law Judge must consider the costs of compliance with state and federal environmental statutes and regulations. United States v. Kosanke Sand Corporation (On Reconsideration), supra. An EIS would permit environmentally informed decision making, by indicating comprehensively and in detail whatever adverse environmental impacts must be mitigated. It would provide a basis for the parties to argue the costs thereof. Under Kosanke, in fulfilling the requirements of § 4332 "to the fullest extent possible," the Department should at the least prepare a statement within the scope of these environmental costs.
>
> 7. NEPA mandates that any EIS will be prepared at the earliest possible moment in order to be of maximum assistance to all. See Greene County Planning Board v. Federal Power Commission, 455 F.2d 412 (2d Cir. 1972); Harlem Valley Transportation Association v. Stafford, 360 F. Supp. 1057 (S.D. N.Y. 1973).

Whether there is a requirement for an environmental impact statement depends upon whether, within the intent of the statute, the nondiscretionary act of issuance of a mining claim patent is a major federal action significantly affecting the human environment. An EIS would encompass much more than computation of the direct environmental costs which are required to be borne by Pittsburgh. While evidence as to such costs may be offered in connection with the hearing on remand, such evidence could be developed without the preparation of an EIS. Kosanke, supra.

Although Pittsburgh located its claim and performed exploration work before NEPA was enacted, no mining has commenced. It could be argued there has not been an irreversible and irretrievable physical commitment of resources. 42 U.S.C. § 4332, part (2)(C)(v) (Supp. V,

1975); Arlington Coalition on Transportation v. Volpe, 458 F.2d 1323, 1331, 1333, 1335, 1337 (4th Cir. 1972), cert. denied, 409 U.S. 1000 (1972). If Pittsburgh were to commence its mining before patenting, the Forest Service would probably prepare a statement before approving a mining plan of such magnitude within the National Forest. 36 CFR Part 252; Friends of the Earth, Inc. v. Butz, 406 F. Supp. 742, 747-48, (D. Mont. 1975), appeal docketed, 9th Cir., No. 75-3477 (Oct. 24, 1975). Forest service regulation 36 CFR 252.4(f) provides:

> Upon completion of an environmental analysis in connection with each proposed operating plan, the authorized officer will determine whether an environmental statement is required. Not every plan of operations, supplemental plan or modification will involve the preparation of an environmental statement. Environmental impacts will vary substantially depending on whether the nature of operations is prospecting, exploration, development, or processing, and on the scope of operations (such as size of operations, con[s]truction required, length of operations and equipment required), resulting in varying degrees of disturbance to vegetative resources, soil, water, air, or wildlife. The Forest Service will prepare any environmental statements that may be required. [Emphasis added.]

As to whether an impact statement is required before prospecting in a national forest, the District Court in Friends of the Earth ruled:

> The defendants argue that an EIS is not yet required, since the Forest Service's approval merely went to defendant [Johns Manville Sales Corporation's] plan of proposed prospecting operations. Defendants point to the 1872 mining law (30 U.S.C. §§ 22 et seq.), and the Organic Act of June 4, 1897 (16 U.S.C. § 748), for the proposition that defendant JMSC has a statutory right to go upon national forest lands for the purposes

> of mineral exploration, development and production. Regardless of what right JMSC may have, the defendants still must comply with NEPA.
>
> * * * * * *
>
> JMSC's operations realistically involve only a small project which will not significantly affect the quality of human environment. But, as JMSC indicates and as the Court completely agrees, if JMSC later desires to proceed with the mining operation, an environmental impact statement will be required before any mining activity commences.

South Dakota also cites Gifford-Hill v. F.T.C., 389 F. Supp. 167 (D. D.C. 1974), for the proposition that an EIS is required with respect to significant actions taken by private persons where federal permission 18/ is required.

In the event that Pittsburgh should apply to the Forest Service for a discretionary exchange of lands in order to gain additional acreage, as discussed supra, presumably an EIS would be required. National Forest Preservation Group v. Butz, 485 F.2d 408, 411-12 (9th Cir. 1973).

If it can be proved that Pittsburgh has made a discovery on a particular claim, then, all else being regular, Interior would have no discretion as to whether patent should issue. Cameron v. United States, 252 U.S. 450 (1920); United States v. O'Leary,

18/ The examples cited by the Court all involve discretionary Federal actions.

63 I.D. 341 (1956). In 1973 United States v. Kosanke Sand Corporation, supra, set out the Departmental position that EIS statements are not generally required in connection with such nondiscretionary patenting of mining claims. The statute pertaining to impact statements was amended in 1975, without pertinent change. 42 U.S.C. § 4332 (Supp. V, 1975).

The Tenth Circuit in its 1975 decision, Scenic Rivers Association of Oklahoma, supra, upheld a 1974 District Court decision that an impact statement was necessary in an interstate commerce matter, despite the fact that a nondiscretionary federal action and private rights were involved. In 1976, on certiorari sub nom. Flint Ridge, supra, the Solicitor General argued forcefully that no statement was required in connection with a nondiscretionary action:

> Indeed, because compliance with the Disclosure Act is prerequisite only to the sale or lease of lots in interstate commerce (15 U.S.C. 1703(a)(1)), and not to the funding of developments, actions significantly affecting the environment can occur well before the developer is required to file his statement of record and property report.
>
> We submit that, in light of the foregoing, NEPA is inapplicable to the effectiveness of developers' filings with OILSR under the Disclosure Act. As Senator Jackson, the principal sponsor of NEPA, stated on the Senate floor, NEPA's procedural requirements simply direct "all agencies to assure consideration of the environmental impact of their actions in decisionmaking" (115 Cong. Rec. 40416 (1969)). Thus, Section 102(2)(A) of NEPA requires federal agencies to utilize a systematic interdisciplinary approach insuring integrated use of relevant science and design arts

> "in planning and in decisionmaking which may have an impact on man's environment" (emphasis added). Section 102(2)(B) directs such agencies to develop methods and procedures to ensure that environmental values "may be given appropriate consideration in decisionmaking along with economic and technical considerations" (emphasis added). And Section 102(2)(C) requires federal agencies to include an environmental impact statement "in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment."
>
> Each of these requirements in Section 102 is aimed at federal agencies that have planning responsibilities or decisionmaking powers -- agencies that can take account of the environmental consequences of their proposed actions and be guided accordingly.

Brief for Petitioner at 16-17, Flint Ridge, supra.

The Supreme Court reversed on other grounds and did not resolve the issue herein concerned.

The Court stated at 426 U.S. 786:

> First, [petitioners] claim, allowing a disclosure statement to become effective is not major federal action significantly affecting the quality of human environment within the meaning of NEPA. In petitioners' view, NEPA is concerned only with introducing environmental considerations into the decision making processes of agencies that have the ability to react to environmental consequences when taking action. If the agency cannot so act, its action is not "major" and does not fall within the statutory language. Thus, petitioners urge, NEPA should not be read to impose a duty on HUD to prepare an environmental impact statement in this case since the agency, by statute, has no power to take environmental consequences into account in deciding whether to allow a disclosure statement to become effective. To this respondents counter, as did the Court of Appeals, that NEPA's goals are not so narrow and that even if the agency taking action is itself powerless to protect the environment, preparation and circulation of an impact statement

serves the valuable function of bringing the environmental consequences of federal actions to the attention of those who are empowered to do something about them -- other federal agencies, Congress, state agencies, or even private parties.

Petitioner's second argument is that even if HUD's action in allowing a disclosure statement to become effective constitutes major federal action significantly affecting the quality of the human environment within the meaning of NEPA, HUD is nonetheless exempt from the duty of preparing an environmental impact statement because compliance with that duty is not possible if HUD is also to comply with the Disclosure Act's requirement that statements of record become effective within 30 days of filing, unless incomplete or inaccurate on their face. In response to this claim, respondents contend that the Secretary has an inherent power to suspend the effective date of a statement of record past the 30-day deadline in order to prepare an impact statement. Because we reject this argument of respondents and find that preparation of an impact statement is inconsistent with the Secretary's mandatory duties under the Disclosure Act, we need not resolve petitioners' first contention. [19/]

19/ In Flint Ridge, the Court further stated at 426 U.S. 787:

"NEPA's instruction that all federal agencies comply with the impact statement requirement -- and with all the other requirements of § 102 -- 'to the fullest extent possible,' 42 U.S.C. § 4332, is neither accidental nor hyperbolic. Rather, the phrase is a deliberate command that the duty NEPA imposes upon the agencies to consider environmental factors not be shunted aside in the bureaucratic shuffle. This conclusion emerges clearly from the statement of the Senate and House conferees, who wrote the 'fullest extent possible' language into NEPA:

'The purpose of the new language is to make it clear that each agency of the Federal Government shall comply with the directives set out in [§ 102(2)] unless the existing law applicable to such agency's operations expressly prohibits or makes full compliance with one of the directives impossible * * *. Thus, it is the intent of the conferees that the provision 'to the fullest extent possible' shall not be used by any Federal agency as a means of avoiding compliance with the directives set out in section 102. Rather, the language in section 102 is intended to assure that all agencies of the Federal Government shall comply with the directive set out in said section 'to the fullest extent possible' under their statutory authorizations and that no agency shall utilize an excessively

The Supreme Court has thus left undetermined whether a NEPA statement is required to be prepared by Government agencies in connection with nondiscretionary actions. If the Justice Department analysis of the statute, as quoted supra, were to be changed, it would have a far reaching effect throughout the Federal Government. With respect to the nondiscretionary issuance of patents, therefore, the Department is constrained to follow the Justice interpretation, 20/ which interpretation is in accord with United States v. Kosanke Sand Corporation, supra.

Further, because the Forest Service has management responsibility for the national forest lands herein concerned, it would appear that the Forest Service would be the appropriate agency to prepare any statement. 21/ No authority has been cited under

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fn. 19 (continued)
narrow construction of its existing statutory authorizations to avoid compliance.' 115 Cong. Rec. 39703 (1969) (House conferees) (emphasis added).
See id., at 40418 (Senate conferees). See also 40 CFR 100.4(a) (1975).

"Section 102 recognizes, however, that where a clear and unavoidable conflict in statutory authority exists, NEPA must give way. As we noted in United States v. SCRAP, 412 U.S. 669, 694 (1973), 'NEPA was not intended to repeal by implication any other statute.' And so the question we must resolve is whether, assuming an environmental impact statement would otherwise be required in this case, requiring the Secretary to prepare such a statement would create an irreconcilable and fundamental conflict with her duties under the Disclosure Act."

20/ See Harrison v. Vose, 18 U.S. (9 How.) 181 (1850).

21/ 36 CFR 252.4(f); 40 CFR 1500.7(b). For an oil and gas lease in a national forest, where the Government retains ownership of the property and Interior supervises the lease, the Board has ruled that Interior is the lead agency for preparation of the statement. W. T. Stalls, 18 IBLA 34, 35-36 (1974).

which the Department could order a full EIS to be prepared by the Forest Service, where the statement is not required by law.

The Board recognizes, however, that a project which would take 240 to 1,140 acres from a national forest, mine over 7 million long tons of ore annually, and each year ship 10,000 railroad cars of finished pellets, is not a typical group of mining claims. The State has requested assistance in computation of the cost to Pittsburgh of measures to be required to alleviate the environmental impact of the project. It would be helpful for the Forest Service, as contestant, to assist the State and appellant in the computation of the evidence of environmental costs at issue in the contest. 22/

New Evidence

Any formal request to consider new evidence as to ore values, energy availability and costs, environmental matters, or other items of expense should be presented to the Administrative Law Judge for his ruling, prior to the rehearing, in connection with the stipulation at Tr. 865 and the problems discussed in United States v. Estate of Alvis F. Denison, 76 I.D. 233, 251-54 (1969).

22/ See 42 U.S.C. § 4332, part (2) and (G) (Supp. V, 1975); Forest Service and Bureau of Land Management Memorandum of Understanding, part A, 11 (April 1, 1957); 43 CFR 4.452-4 and 4.452-5. Cf. 36 CFR 252.4(f), supra.

On remand, 23/ the Administrative Law Judge will have discretion to entertain any other issues which he deems proper, in order to formulate the required findings and conclusions.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is set aside and the matter is remanded.

Joseph W. Goss
Administrative Judge

We concur:

Anne Poindexter Lewis
Administrative Judge

Martin Ritvo
Administrative Judge

23/ Other points of law and fact have been argued on appeal, but because of the decision to remand, such matters need not be discussed at this time.